No. 75-1170

In the Supreme Court of the United States

OCTOBER TERM, 1975

GERALD V. KEHRLI, ETC., PETITIONER

v.

HOMER R. SPRINKLE, COMMANDANT, ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 524 F. 2d 328. The opinions of the district court (Pet. App. 15a-25a, 31a-46a) are not reported. The opinion of the United States Air Force Court of Military Review (Pet. App. 49a-58a) is reported at 44 C.M.R. 582.

JURISDICTION

The judgment of the court of appeals was entered on October 20, 1975. On January 6, 1976, Mr. Justice White extended the time for filing a petition for a writ of certiorari to and including February 18, 1976; the petition was filed on February 17, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether in this habeas corpus proceeding the courts below, after having concluded that the military courts had fully and fairly considered petitioner's claims of irregularities in his court-martial proceedings and that his arrest had not been based upon probable cause, properly refused to engage in plenary review of those claims.

2. Whether Article 134 of the Uniform Code of Military Justice is constitutional as applied to the possession, use and transfer of marijuana.

3. Whether petitioner's sentence is constitutional.

STATEMENT

1. Following the convening of a general court-martial in the former Republic of Viet Nam, petitioner was convicted on three specifications charging use of marijuana, two specifications charging the transfer of marijuana, and one specification charging possession of marijuana, in violation of Article 134 of the Uniform Code of Military Justice

("U.C.M.J."), 10 U.S.C. 934.[1] He was sentenced to four years' imprisonment at hard labor. In lieu of the fourth year of confinement, petitioner was given the option of paying a $15,000 fine.[2]

2. The evidence at the court-martial showed that during the fall of 1970, petitioner, a full colonel, was the commanding officer of the 616th Military Airlift Support Squadron, which was then stationed at the Tan Son Nhut Air Base near Siagon. In early October of that year, petitioner met Lieutenant Peter Jackson, an Army intelligence officer (R. 127-129). Petitioner confided to Jackson that he used marijuana and that he had converted a junior officer under his command to the use of marijuana (R. 129). Later that same night, petitioner smoked two marijuana cigarettes in Jackson's presence (R. 130-132).

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[1] Article 134 of the U.C.M.J., 10 U.S.C. 934, provides as follows:

> Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

[2] Petitioner began serving his sentence in January 1972. He was released on parole in May 1973, and remained in that status until January 1975. Petitioner completed payment of the fine in January 1976 (Pet. 7).

Upon returning to his unit the following day, Jackson briefed his superiors concerning petitioner's use of marijuana (R. 132, 135). When petitioner subsequently invited Jackson to meet him in Saigon on November 20, Jackson alerted military authorities and arrangements were made for surveillance of the meeting (R. 135). Jackson was instructed to signal the surveilling officers with his handkerchief if he found that petitioner possessed marijuana (R. 43-44, 136).

Jackson met petitioner in Saigon on November 20, as scheduled, and the two went to the latter's quarters. Once there, petitioner stated that he expected a delivery of marijuana, but that if the delivery was not made Jackson need not worry "because he [petitioner] had four in his room" and "two apiece would be more than enough to do it" (R. 137). When the delivery did not take place, petitioner went into his bedroom and returned carrying a crumpled cigarette package. Petitioner then suggested that Jackson accompany him to the officer's club, "smoke two in the parking lot, go downtown and have a few drinks, and smoke two downtown" (*ibid.*).

As Jackson and petitioner were leaving the latter's quarters, Jackson signaled the surveilling officers. The officers arrested petitioner before he had gotten out of his car outside the officer's club (R. 45-46, 138). As petitioner got out of his car, the arresting officer noticed a cigarette package fall from petitioner's hand onto the door ledge of the car (R. 35-36).

The officer seized the package and found that it contained four marijuana cigarettes (R. 36).

Five enlisted airmen, assigned to petitioner's squadron, testified at petitioner's court-martial for the prosecution. In sum, they related that petitioner had invited them to his quarters on several occasions and that on those occasions they had smoked marijuana with petitioner. The airmen further testified that petitioner sometimes provided the marijuana, while on other occasions the marijuana was provided by petitioner's guests. One of the airmen also testified that he had twice purchased marijuana for petitioner, once after having been specifically requested to do so by petitioner (R. 85-90, 96-99, 107-110, 115-116, 122-123).

3. Following petitioner's conviction by general court-martial, the case was reviewed on behalf of the convening authority by the Staff Judge Advocate of the 22d Air Force and the convening authority thereafter approved the conviction (Pet. App. 59a-81a). The United States Air Force Court of Military Review subsequently affirmed petitioner's conviction and sentence (Pet. App. 49a-58a), and the United States Court of Military Appeals denied a petition seeking further review (Pet. App. 47a-48a).

Having exhausted his remedies within the military, petitioner initiated the present habeas corpus proceeding in June 1972 in the United States District Court for the District of Kansas.[3] He alleged in his

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[3] Since petitioner was "in custody" at the time he petitioned for habeas corpus (see n. 2, *supra*), the district court had

petition fifteen errors, including alleged procedural defects in the convening of his court-martial and challenges to the legality of his arrest and to the constitutionality of Article 134 of the U.C.M.J. After having reviewed the materials submitted by petitioner, the district court denied the petition (Pet. App. 31a-46a).

The court of appeals subsequently remanded the case to the district court for consideration of the constitutionality of Article 134 of the U.C.M.J. in light of *Avrech* v. *Secretary of the Navy*, 477 F. 2d 1237 (C.A. D.C.)—which had been decided after the district court's decision in this case. The district court thereafter again denied the petition (Pet. App. 15a-27a),[4] and the court of appeals affirmed (Pet. App. 1a-14a).

ARGUMENT

1. Petitioner first contends (Pet. 16-25) that the district court and the court of appeals erred in refusing to consider *de novo* his claims that irregularities in his court-martial deprived him of due process and that his arrest was not based upon probable cause. According to petitioner, the refusal of the civilian courts to consider those claims on their merits proceeded from a misapprehension of this Court's

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jurisdiction to entertain the petition. His unconditional release from custody in January 1976 did not defeat jurisdiction. *E.g., Carafas* v. *LaVallee*, 391 U.S. 234.

[4] The court of appeals' decision in *Avrech* v. *Secretary of the Navy, supra*, was reversed by this Court (418 U.S. 676) after the district court's decision on remand denying petitioner's habeas petition.

decision in *Burns* v. *Wilson*, 346 U.S. 137 rehearing denied, 346 U.S. 844, and is a matter requiring review by this Court.

Under settled principles, however, the questions whether petitioner's court-martial was infected by procedural irregularities and whether his arrest was based upon probable cause are resolvable only on the basis of the evidence introduced at the court-martial. The courts below correctly held that the scope of review on habeas corpus does not extend to the redetermination of facts found in military proceedings, but is limited instead to determining whether the military courts fully and fairly considered such claims.

2. This Court repeatedly has recognized that military law constitutes a different jurisprudential system from the law governing civilian conduct. *E.g., Schlesinger* v. *Councilman*, 420 U.S. 738, 746; *Parker* v. *Levy*, 417 U.S. 733, 744. Review of convictions by courts-martial on habeas corpus is accordingly limited. As stated in *Burns* v. *Wilson*, *supra*, 346 U.S. at 142 (citations omitted):

> The military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights. In military habeas corpus cases, even more than in state habeas corpus cases, it would be in disregard of the statutory scheme if the federal civil courts failed to take account of the prior proceedings—of the fair determinations of the military tribunals after all military remedies have been exhausted. Congress has provided that these determinations are "final" and "binding" upon all courts. We have

> held before that this does not displace the civil courts' jurisdiction over an application for habeas corpus from the military prisoner. * * * But these provisions do mean that when a military decision has dealt fully and fairly with an allegation raised in that application, it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence. * * *

Petitioner apparently concedes (see Pet. 16-18) that *Burns* precludes *de novo* review on habeas corpus of questions raising factual, as opposed to purely legal, issues already fully and fairly considered by the appropriate military tribunals. But while petitioner's claims of procedural irregularities and his Fourth Amendment claim call ultimately for legal conclusions, such conclusions necessarily require—and are directly dependent upon—detailed factual determinations. Thus, rather than presenting purely legal issues, petitioner's claims would have required the courts below "to re-examine and reweigh each item of evidence of the occurrence of events which tend[ed] to prove or disprove [his] * * * allegations." *Burns* v. *Wilson*, *supra*, 346 U.S. at 144. The courts below properly declined to engage in such reevaluation. *Calley* v. *Callaway*, 519 F. 2d 184, 198-203 (C.A. 5) (*en banc*), certiorari denied, No. 75-773 (April 5, 1976); *Levy* v. *Parker*, 478 F. 2d 772, 783 (C.A. 3), reversed on other grounds, 417 U.S. 733; *Allen* v. *VanCantfort*, 436 F. 2d 625, 629 (C.A. 1), certiorari denied, 402 U.S. 1008; *Harris* v. *Ciccone*, 417 F. 2d 479, 481 (C.A. 8), certiorari denied, 397

U.S. 1078; see also *United States* v. *Augenblick*, 393 U.S. 348, 349-352.

3. The military courts fully and fairly considered the variety of procedural errors in the convening of the court-martial that petitioner claimed had deprived him of due process. They also properly rejected his contention that his arrest was not based upon probable cause.[5]

a. Before charges may be referred for trial by general court-martial, Article 32(a) of the U.C.M.J. requires that "a thorough and impartial investigation" be conducted. 10 U.S.C. 832(a). During such investigation, which is analogous to a preliminary hearing (see *Humphrey* v. *Smith*, 336 U.S. 695, 698), the accused is afforded the right to counsel, to cross-examine adverse witnesses and to proffer evidence on his own behalf. 10 U.S.C. 832(b). Petitioner contends (Pet. 21) that he was denied due process because the inquiry officer conducted *ex parte* interviews of persons who later testified at the investigation. But no provision of the U.C.M.J. or the Manual for Courts-Martial proscribes such a practice. When, as here, petitioner was represented at the formal investigatory hearing by counsel and—as he

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[5] Petitioner suggests (Pet. 20 n. 6) that these issues were not fully and fairly considered by the military courts because of reliance by the Court of Military Review upon the analysis of the Staff Judge Advocate. As the district court correctly noted, however, "[t]here is no requirement that an Appellate Court reiterate what has already been said at a lower level, if it agrees with the prior determination which is of record and is readily available to the interested parties" (Pet. App. 40a).

concedes (Pet. 21)—afforded full rights of cross-examination, the requirements of a "thorough and impartial investigation" and of due process were satisfied.[6]

b. Petitioner next contends (Pet. 22) that the charges against him were improperly processed because his immediate superior officer, who could have exercised summary court-martial jurisdiction over him, was by-passed. Again, however, neither the U.C.M.J. nor the Manual for Courts-Martial requires that charges be processed at each command level.

Contrary to petitioner's suggestion, moreover, the officer authorized to exercise general court-martial jurisdiction—in petitioner's case, the commander of the Seventh Air Force—was not limited to referring charges for trial by general courts-martial. Such officer "may take any action on the charges which the immediate commander * * * or the officer exercising summary court-martial jurisdiction * * * is authorized to take." Manual for Courts-Martial, para. 35*a* (1969 Rev.). Thus, the by-passing of petitioner's immediate superior officer did not preclude any disposition of the charges that would otherwise have been available—and did not deprive petitioner of any statutory or constitutional rights.

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[6] Even assuming that the prehearing interviews conducted in this case departed in some way from the requirements of Article 32, that fact would not provide grounds for invalidating petitioner's conviction. See *Humphrey* v. *Smith*, *supra*, 336 U.S. at 698-701; *Harris* v. *Ciccone*, *supra*, 417 F. 2d at 483.

c. The record does not support petitioner's contention (Pet. 22) that the court-martial may have been affected by improper command influence. Petitioner bases this claim on a speech that was given by General Lucius Clay, Commander of the Seventh Air Force, three weeks prior to petitioner's arrest. General Clay stated in that speech that drug abuse detracted from the mission of the military and could not be tolerated; that offenders of different ranks would be treated differently; that more was expected from senior NCO's and officers than from others; and that persons who deviated from standards of required conduct could expect to be punished (R. 20).

But petitioner has not shown that General Clay's remarks affected the impartiality of his court-martial. The speech in question was made before a group of junior officers, and there is no evidence that members of the court were even aware of the speech. Moreover, petitioner has not claimed that he was denied adequate opportunity to question prospective members of the court to ascertain whether they were aware of the speech. The speech occurred well before charges were brought against petitioner and was framed in general terms. It was not directed against petitioner and did not relate to the case against him. Compare *Kasey* v. *Goodwyn*, 291 F. 2d 174 (C.A. 4).

d. Petitioner also argues (Pet. 22-23) that General Clay was not authorized to convene his general court-martial because he was petitioner's *de facto* accuser. See Articles 1(9) and 22(b), 10 U.S.C. 801 (9) and 822(b). This claim is directly refuted by the

stipulated testimony of General Clay and General Bennett, Chief of Staff of the Seventh Air Force, who brought the charges against petitioner. As the Staff Judge Advocate summarized this testimony (Pet. App. 66a-67a):

> The parties to the trial agreed that General Clay would have testified that, as the general court-martial convening authority for Seventh Air Force, between 20 and 29 November 1970, he was briefed by Colonel Archie Henson, Seventh Air Force Staff Judge Advocate, on the alleged conduct giving rise to the charges in the accused's case. General Clay directed that charges be preferred and that the case be referred to trial by general court-martial. He directed that Colonel Henson do what was necessary to process the case (App. Ex. 2). The parties to the trial agreed that Brigadier General Charles I. Bennett, Jr., would have testified that on 29 November 1970 and on 23 December 1970, he preferred charges against the accused, having obtained personal knowledge of the results of the investigation into the accused's conduct, pursuant to Colonel Henson's recommendations and because of the accused's unique duty status. He did not know whether General Clay knew of or consented to his preferring these charges. He was not ordered to prefer the charges; and, prior to signing the charge sheets, he discussed the matter with no one save Colonel Henson * * *.

These procedures fully comported with applicable requirements, as outlined in the Manual for Courts-Martial, para. 5*a*(4) (1969 Rev.):

> Action by a commanding officer which is merely official and in the strict line of duty cannot be regarded as sufficient to disqualify him [from convening a court-martial]. For example, a commanding officer may, without becoming an accuser in the case, direct a subordinate to investigate an alleged offense with a view to formulating and preferring appropriate charges if the facts disclosed by the investigation should warrant preferring charges. The commanding officer may thereafter refer the charges for trial as in other cases.

General Clay's action in this case was the same as that of the commanding officer in the situation described in the Manual.

e. The record also refutes petitioner's contention (Pet. 24-25) that his arrest was not based upon probable cause. As noted, Lieutenant Jackson had previously observed petitioner smoking marijuana. On the night of his arrest, petitioner told Jackson that he was expecting a delivery of marijuana, but that he had four marijuana cigarettes in his quarters in the event the expected delivery did not occur. Before leaving petitioner's quarters, Jackson observed petitioner enter his bedroom and return with a crumpled, open cigarette package. Petitioner stated at that time that they could "smoke two" in the parking lot of the officer's club and later "smoke two" downtown. Based upon these events, Jackson had probable cause to believe that petitioner possessed a prohibited substance.[7]

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[7] Petitioner's arrest and the consequent seizure of the marijuana cigarettes that he dropped upon getting out of his car

4. The district court and the court of appeals carefully considered, and correctly rejected, petitioner's contention (Pet. 25-31) that Article 134, 10 U.S.C. 934, is unconstitutional as applied to the possession, use and distribution of marijuana. While there may be areas with respect to which application of Article 134 is uncertain (*Parker* v. *Levy*, *supra*, 417 U.S. at 754), there can be little doubt that the article prohibits repeated marijuana offenses in a combat zone. As noted in *Parker* v. *Levy*, almost all acts charged under Article 134—most notably, drug offenses—are acts that ordinary soldiers know are punishable offenses.[8] 417 U.S. at 763 (Blackmun, J., concurring).

Indeed, the inclusion of marijuana offenses within Article 134's general proscription of conduct "to the prejudice of good order and discipline in the armed forces" is specified in the Manual for Courts-Martial. In explaining conduct within the reach of Article 134, the Manual states that "[i]t is a violation of this article wrongfully to possess or use marijuana

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outside the officer's club were not made unlawful by the fact that Lieutenant Jackson had not previously supplied the arresting officer with similar information or because the arresting officer did not himself observe the events supplying probable cause. See *United States* v. *Ventresca*, 380 U.S. 102, 111; *Aguilar* v. *Texas*, 378 U.S. 108, 114-115; *United States* v. *Goeltz*, 513 F. 2d 193, 197 (C.A. 10), certiorari denied, 423 U.S. 830; *United States* v. *Nieto*, 510 F. 2d 1118, 1120 (C.A. 5), certiorari denied, 423 U.S. 854; *United States* v. *Welebir*, 498 F. 2d 346, 349 n. 2 (C.A. 4).

[8] Petitioner has never claimed that he did not know that the use of marijuana violated Article 134 (see Pet. App. 13a).

* * *." Manual for Courts-Martial, para. 213*b* (1969 Rev.). In view of petitioner's status as a commanding officer and his concomitant responsibility to explain the scope of the general article to enlisted men under his command (see Article 137, 10 U.S.C. 937), it can hardly be said that petitioner lacked fair notice that his possession, use and distribution of marijuana violated Article 134. See *Parker* v. *Levy*, *supra*, 417 U.S. at 756-757; *Secretary of the Navy* v. *Avrech*, 418 U.S. 676.

Petitioner's contention (Pet. 31) that the prohibition against the use and possession of marijuana violates his right to privacy is also without merit. No federal court has ever found such a privacy interest in a civilian setting—much less in a military one. Petitioner's further suggestion (Pet. 27) that the offenses of which he was convicted may not have been

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[9] Petitioner also argues (Pet. 29-30) that proscriptions directed against the use or possession of marijuana are arbitrary. This argument has been universally rejected by the federal courts that have considered it. *E.g.*, *United States* v. *Spann*, 515 F. 2d 579, 583-584 (C.A. 10); *United States* v. *LaFroscia*, 485 F. 2d 457 (C.A. 2); *United States* v. *Kiffer*, 477 F. 2d 349, 355-357 (C.A. 2), certiorari denied, 414 U.S. 831; *United States* v. *Rodriquez-Camacho*, 468 F. 2d 1220 (C.A. 9), certiorari denied, 410 U.S. 985.

The Manual for Courts-Martial does distinguish, contrary to petitioner's assertion (Pet. 29), between habit-forming and nonhabit-forming drugs, such as marijuana. Paragraph 127*c* of the Manual provides that the maximum punishment for a single use of a habit-forming drug is ten years' imprisonment and that the maximum penalty for a use of marijuana is five years' imprisonment.

"service-connected" is similarly unavailing. As the court below concluded, "the military certainly has a vital interest in the use of drugs by service personnel in combat zones, and on or near military installations" (Pet. App. 9a). See *Relford* v. *United States Disciplinary Commandant*, 401 U.S. 355, 365; *O'Callahan* v. *Parker*, 395 U.S. 258, 273-274. This is particularly so in the case of a commanding officer of petitioner's high rank.

5. Finally, petitioner contends (Pet. 31-32) that his sentence constituted cruel and unusual punishment, in violation of the Eighth Amendment. While petitioner's personal possession and use of marijuana were serious offenses, he also transferred the drug to enlisted men. Such misconduct increased the hazards to his men, who were serving in a combat zone, and encouraged disobedience of the law and disrespect for superior officers. Petitioner's sentence was well within the maximum punishment allowable under the Manual for Courts-Martial, para. 127*c* (1969 Rev.), and is constitutional.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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